BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT W. DUFFIN, SR.)

For Appellant: Robert W. Duffin, Sr., in pro. per.

For Respondent: John A. Stilwell, Jr. Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert W. Duffin, Sr., against proposed assessments of additional personal income tax in the amounts of $184.38 and $156.95 for the years 1977 and 1978, respectively.

The issues for determination are: (1) whether respondent was correct in disallowing appellant's deductions for his payments to a Department of Defiense survivor benefit plan; (2) whether respondent properly treated appellant's deductions for nonrepayment of personal loans as short term capital losses; and (3) whether respondent was correct in disallowing appellant's moving expense deduction.

Appellant filed personal income tax returns for 1977 and 1978. In these years, appellant took deductions for his contributions to a survivor benefit plan established by the United States Department of Defense and for the "nonrepayment of personal loans." Furthermore, in 1977, appellant took a moving expense deduction. For this deduction, appellant filled out form 3805U (Moving Expense Adjustment) and indicated that he moved in 1977 from Reno, Nevada, to San Jose, California, and that he did not receive reimbursement for his moving expenses.

Respondent determined that appellant and his wife were not entitled to the above-mentioned deductions. Respondent, therefore, issued.notices of proposed assessment to appellant and his wife for the taxable years 1977 and 1978. In place of the deduction for the nonrepayment of personal loans, respondent allowed a $1,000.00 capital loss for each of the years in issue, with a loss carryover of the unused balance usable in succeeding years. Appellant disagreed with respondent's adjustments and, filed a timely protest. After due consideration of appellant's protest, respondent affirmed the proposed assessments and issued notices of action to appellant and his wife. This appeal followed. Subsequently, respondent conceded that its disallowance of appellant's 1978 deduction for the nonrepayment of personal loans should have been in the amount of $1,570.00 instead of $1,750.00.

Department of Defense Survivor Benefit Plan

Appellant asserts that Revenue and Taxation Code sections 17501 through 17529 do not specifically exclude the deduction of payments to a survivor benefit plan, and, therefore, the deduction should be allowed. However, it is well settled that deductions are a matter of legislative grace, and only where there is a clear provision for the deduction can it be allowed. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934).) Therefore, the lack of a specific

exclusion in the statutes is not sufficient; there must be a provision in the statutes which specifically allows the deduction.

In the alternative, appellant contends that Revenue and Taxation Code sections 17501 through 17502.8 authorize the deduction of his contributions to the survivor benefit plan. Appellant explains that the survivor benefit plan is administered by the Department of Defense, provides payments to his beneficiaries upon his death as an extension of his military retirement pay, and that participation is mandatory upon retirement.

Revenue and Taxation Code sections 17501 through 17502.8 provide the qualification requirements for pension, profit sharing, and stock bonus-plans, allow retroactivity of changes in a plan, and define terms relevant to the interpretation of these plans. These code sections do not deal at all with the deductibility of contributions to qualified plans. Moreover, the contributions described by appellant do not appear to be deductible under any other section of the Revenue and Taxation Code. We must conclude, therefore, that respondent correctly disallowed appellant's claimed deduction of his contributions to the, survivor benefit plan.

The Nonrepayment of Personal Loans

Revenue and Taxation Code section 17207 allows 'the deduction of any debt which becomes worthless within the taxable year. Subdivision (d)(l)(A) of this code section, however, excludes from this treatment nonbusiness debts which become worthless within the taxable year. Subdivision (d)(l)(B) of this code section provides that the loss resulting from a nonbusiness debt "shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than one year." Revenue and Taxation Code section 18152, subdivision (a), limits the annual deduction for losses from sales or exchanges of capital assets to the extent of the gains from such sales or exchanges, plus the lesser of the taxable income for the year, or $1,000.00. Section 18152, subdivision (d), provides that, "the excess of such net capital loss shall be a capital loss in the succeeding taxable year." On the basis of these code sections, respondent treated appellant's losses arising from the nonrepayment of personal loans as $1,000.00 short term capital losses with a carryover of the excess of such net capital losses into succeeding years.

Appellant concedes that the debts to him arising from personal loans are nonbusiness debts. Nevertheless, appellant disagrees with respondent's treatment of his losses, but provides no argument to support his position. Code section 17207 is clear on its face in mandating capital loss treatment of nonbusiness bad debts. In view of the fact that appellant has not presented any reason why its terms should-not be applied, we hold that respondent correctly treated appellant's nonbusiness debt losses as capital losses.

Moving Expense Deduction

Respondent's disallowance of the moving expense deduction is based on section 17266, subdivision (d), of the Revenue and Taxation Code, which provides, in relevant part:

> In the case of an individual whose former residence was outside this state and his new place of residence is located within this state . . . the deduction allowed by this section shall be allowed only if any amount received as payment for or reimbursement of expenses of moving from one residence to another residence is includable in gross income as provided by Section 17122.5 and the amount of deduction shall be limited only to the amount of such payment or reimbursement or the amounts specified in subdivision (b), whichever amount is lesser."

Initially, appellant contends that under California law he is allowed a deduction for the expenses incurred in moving to California from Nevada, even though he did not receive reimbursement of these moving expenses. This is essentially the same situation which was before us in the Appeal of Edmonston F. and Arlene I. Coil, decided by this board on May 19, 1981. In that case, the taxpayer had moved to California from Maryland. We held that, since the taxpayers did not receive any reimbursement for the expenses of moving, they were not entitled to a moving expense deduction under section 17266. On the basis of our decision in the Coil case, we must reject appellant's first contention.

Appellant follows this contention with an argument that Revenue and Taxation Code section 1'7266, subdivision (d), is unconstitutionally discriminatory. This board has a long-standing policy of not deciding

constitutional questions in appeals involving deficiency assessments. This policy is based on the absence of any specific statutory authority that would allow respondent to secure judicial review of an adverse decision by this board. (Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.) Consequently, we must decline to rule on appellant's constitutional argument.

Next, appellant alleges that respondent's determination of tax was based on a version of Revenue and Taxation Code section 17266, subdivision (d), that was not in effect for taxable year 1977. The substantive content of section 17266, subdivision (d), has remained unchanged from 1971 to this day. Therefore, we find appellant's'allegation to be without merit.

Finally, appellant contends that he relied on respondent's written instructions for preparing his 1977 tax return. Appellant also asserts that he presented his 1977 tax return to respondent's employees and was led to believe that the return was properly prepared. Therefore, appellant argues, respondent should be estopped from disallowing appellant's moving expense deduction.

As a general rule, an estoppel will be applied against the government in a tax case only where the facts clearly establish that grave injustice would otherwise result. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal.2d 865 [3 Cal.Rptr. 6751 (1960); Appeal of Allen L. and Jacqueline M. Seaman, Cal. St. Bd. of Equal., Dec. 16, 1975.) An essential prerequisite for application of the doctrine of estoppel is a clear showing of detrimental reliance on the part of the taxpayer.- (Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978.) In the instant case, the facts that are fatal to appellant's claimed moving expense deduction occurred well before he relied on the written instructions and well before he sought advice from respondent's employees. Thus, since appellant did not rely to his detriment, we must reject his estoppel argument. (See Appeal of Linda L. White, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977.)

For the reasons stated above, we conclude that respondent's assessments, as modified by correcting the disallowed amount of appellant's 1978 nonbusiness bad debt deduction,- must be sustained.

Appeal of Robert W. Duffin, Sr.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert W. Duffin, Sr., against proposed assessments of additional personal income tax in the amounts of $184.38 and $156.95 for the years 1977 and 1978, respectively, be and the same is hereby modified to reflect respondent's concession regarding the amount disallowed as a bad debt deduction for 1978. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 4th day of May, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member